A

MD ZAINUDDIN RAUJAN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
AHMAD MAAROP JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: J-05-160-2009]

C

4 MAY 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in - Conviction and sentence - Appeal against - Credibility of witnesses - Whether trial judge properly assessed evidence of witnesses - Failure of prosecution to call material witnesses - Gaps in prosecution's case - Whether appellant failed to rebut statutory presumption under s. 37(da) - Whether prima facie case established*

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EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Prerequisites under s. 27 Evidence Act 1950 - Whether complied with - Whether trial within trial necessary to determine admissibility of information - Dangerous Drugs Act 1952, s. 37A*

E

This was an appeal by the accused ('appellant') against his conviction for trafficking in dangerous drugs. He was charged with three counts under s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') for trafficking in, (a) 6,517 grams of cannabis; (b) 137.88 grams of heroin; and (c) 139.38 grams of monoacetylmorphines. Acting on an information, SP5 and his party raided a house in Tongkang Pecah, Batu Pahat and arrested the appellant. In the course of an interrogation, the appellant admitted to SP5 that he had kept drugs in the 'kawasan kebun' behind his father's house. The appellant led SP5 and his men to the 'kawasan kebun' where the drugs were recovered from different spots pointed out by the appellant. At the end of the prosecution's case, the trial judge held that a *prima facie* case was made out against the appellant and he was called to enter his defence. At the end of the defence case, the trial judge held that the crux of the defence case grounded upon mere denial. The appellant was accordingly found guilty, convicted of the charges against him and sentenced to death. The

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appellant submitted that the trial judge had misdirected himself when he admitted the s. 27 Evidence Act 1950 ('the Act') information to the prejudice of the appellant. The counsel's main objection was premised on the ground of unfairness because (i) the trial judge had rejected his application for a trial within a trial before the admission of exh. P17; (ii) the trial judge had seriously erred when he ruled that PW5 was credible, contrary to the evidence adduced; (iii) the trial judge failed to recognise that the prosecution's failure to call other key witnesses had created gaps in its case; and (iv) the trial judge failed to appreciate the defence case.

Held (dismissing appeal; affirming conviction and death sentence)

Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The trial judge was satisfied that the prerequisites of s. 27 of the Act had been complied with. The information given by the appellant was proven by PW5's oral evidence. PW5 testified that upon interrogation, the appellant admitted that he had kept drugs in the 'kawasan kebun' behind his father's house. Exhibit P17 was the piece of paper on which PW5 wrote down the information given by the appellant after administering the statutory caution under s. 37A of the DDA. That information led the police to the discovery of the drugs. It is trite law that a trial within a trial is not necessary to determine the admissibility of the said information obtained under the said s. 27. The prosecution is under no obligation to prove voluntariness of the information given (*Amathevelli R Ramasamy v. PP*; refd). The admission of the statement is an exercise of discretion by the trial judge based on established legal principles (*Krishna Rao Gurumurthi v. PP*; refd; *Francis Antonysamy v. PP*; refd). Thus, the trial judge herein had rightly exercised his discretion in refusing the application for a trial within a trial. (paras 11-15)

(2) The trial judge had assessed the evidence of not only PW5, but also all the other witnesses for the prosecution in concluding that a *prima facie* case had been established. The

A trial judge was constantly mindful of the contradictions in the evidence before him. The trial judge in carrying out his function as a trier of facts and reception of evidence was merely exercising his judicial discretion of accepting or rejecting the evidence of a particular witness. It is within the purview
B of the trial judge's function to assess the credibility of witnesses who gave evidence before him. He had the audio visual advantage of assessing them. It is also trite law that appellate courts will always be slow to interfere in matters relating to the credibility of witnesses. (paras 17-19)

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(3) The appellant submitted that the failure of the prosecution to call one Chief Inspector Ramesh and one Sarjan Major Ahmad Rosli created a gap in their case. Both these named persons were part of the police party that went to the appellant's
D father's house. However, it was the finding of the trial judge that the contradictions in the evidence of PW5 were either immaterial or minor and had accepted PW5's evidence. The evidence of PW5 was held to be credible enough and sufficient to prove the ingredients of the charges preferred
E against the appellant. The non-calling of these two witnesses did not create a gap in the prosecution's case. Their evidence was not material for the unfolding of the narratives of the prosecution's case. PW5's evidence together with the evidence of other witnesses called by the prosecution was sufficient to
F make out a *prima facie* case against the appellant. (paras 20-22)

(4) The totality of the evidence put forth by the appellant was but a plain denial which, in the circumstances of the case, and without any supporting evidence would be insufficient to cast
G a reasonable doubt on the prosecution's case. The appellant had also failed to rebut on the balance of probabilities, the statutory presumption under s. 37(da) of the DDA. The trial judge had considered and evaluated all of the evidence before him and was correct in arriving at the findings and conclusion
H which he did. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan tertuduh ('perayu') terhadap sabitan mengedar
I dadah berbahaya. Tertuduh didakwa dengan tiga pertuduhan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') bagi

pengedaran (a) 6,517 gram kanabis; (b) 137.88 gram heroin; dan (c) 139.38 gram monoacetylmorphines. Bertindak atas maklumat yang diberikan, SP5 dan pasukannya, telah menyerbu sebuah rumah di Tongkang Pecah, Batu Pahat dan menahan perayu. Semasa menjalankan soal siasat, perayu mengaku kepada SP5 bahawa beliau telah menyimpan dadah-dadah di kawasan kebun belakang rumah bapanya. Perayu telah membawa SP5 dan pasukannya ke kawasan kebun di mana dadah-dadah tersebut dijumpai daripada beberapa tempat berlainan yang telah ditunjukkan oleh perayu. Pada akhir kes pendakwaan, hakim bicara memutuskan bahawa terdapat kes *prima facie* terhadap perayu dan memanggilnya untuk mengemukakan pembelaannya. Pada akhir kes pembelaan, hakim bicara mendapati bahawa teras kes pembelaan adalah berdasarkan penafian semata-mata. Perayu didapati bersalah, disabitkan atas pertuduhan-pertuduhan yang dikemukakan terhadapnya dan dihukum mati. Perayu menghujahkan bahawa hakim bicara telah tersalah arah apabila beliau menerima maklumat s. 27 Akta Keterangan 1950 ('Akta') yang telah memprejudiskan perayu. Bantahan utama peguam bersandarkan alasan ketidakadilan kerana: (i) hakim bicara telah menolak permohonannya untuk mengadakan perbicaraan dalam perbicaraan sebelum kemasukan eks. P17; (ii) hakim bicara telah khilaf apabila memutuskan PW5 boleh dipercayai, bertentangan dengan keterangan yang dikemukakan; (iii) hakim bicara gagal mengenalpasti bahawa kegagalan pihak pendakwaan memanggil saksi-saksi penting telah mewujudkan jurang dalam kesnya; dan (iv) hakim bicara gagal menimbangkan kes pembelaan dengan betul.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman mati)

Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara berpuas hati bahawa prasyarat-prasyarat s. 27 Akta telah dipatuhi. Maklumat yang diberikan oleh perayu telah dibuktikan melalui keterangan lisan PW5. PW5 memberikan keterangan bahawa apabila disoal siasat, perayu mengakui telah menyimpan dadah-dadah di kawasan kebun belakang rumah bapanya. Eksibit P17 adalah sekeping kertas di mana PW5 telah menulis maklumat yang diberikan oleh perayu selepas memberikan pernyataan beramaran di bawah s. 37A ADB.

Maklumat tersebut telah membawa pihak polis kepada penemuan dadah-dadah tersebut. Ia adalah undang-undang mantap bahawa perbicaraan dalam perbicaraan tidak diperlukan untuk menentukan kebolehterimaan maklumat yang diperolehi di bawah s. 27 tersebut. Pihak pendakwaan tidak mempunyai kewajipan untuk membuktikan kesukarelaan maklumat yang diberikan (*Amathevelli R Ramasamy v. PP*, dirujuk). Kemasukan penyata adalah perlaksanaan budi bicara oleh hakim bicara berdasarkan prinsip undang-undang yang mantap (*Krishna Rao Gurumurthi v. PP*, dirujuk; *Francis Antonysamy v. PP*, dirujuk.) Oleh itu, hakim bicara di sini telah dengan betul melaksanakan budi bicaranya dalam penolakan permohonan perbicaraan dalam perbicaraan.

(2) Hakim bicara telah menilai bukan sahaja keterangan PW5, tetapi juga saksi-saksi bagi pihak pendakwaan apabila beliau memutuskan satu kes *prima facie* telah dibuktikan. Hakim bicara sentiasa prihatin dengan percanggahan-percanggahan keterangan di hadapannya. Hakim bicara dalam menjalankan tugasnya sebagai pengadil fakta dan penerima keterangan hanya melaksanakan budi bicara kehakimannya dalam menerima atau menolak keterangan saksi tertentu. Ia adalah dalam bidangkuasa fungsi-fungsi hakim bicara untuk menilai kredibiliti saksi-saksi yang memberikan keterangan di hadapannya. Beliau mempunyai kelebihan audio visual ketika membuat penilaian. Ia juga undang-undang tetap bahawa mahkamah rayuan amat berhati-hati untuk campurtangan dalam perkara-perkara berhubungan kredibiliti saksi-saksi.

(3) Perayu menghujahkan bahawa kegagalan pihak pendakwaan memanggil satu Ketua Inspektor Ramesh dan Sarjan Major Ahmad Rosli telah mewujudkan jurang di dalam kes pendakwaan. Kedua-dua orang yang dinamakan tersebut merupakan sebahagian pasukan polis yang telah pergi ke rumah bapa perayu. Walau bagaimanapun, ia adalah dapatan hakim bicara bahawa percanggahan-percanggahan pada keterangan PW5 adalah tidak penting atau kecil dan telah menerima keterangan SP5. Keterangan SP5 diputuskan sebagai boleh dipercayai dan memadai untuk membuktikan inipati-intipati pertuduhan yang dikemukakan terhadap perayu. Kegagalan memanggil dua saksi tersebut tidak mewujudkan jurang di

dalam kes pendakwaan. Keterangan mereka tidak penting bagi pembentangan cerita kes pendakwaan. Keterangan PW5 bersama-sama dengan keterangan saksi-saksi lain yang dipanggil oleh pihak pendakwaan adalah memadai untuk membentuk satu kes *prima facie* terhadap perayu.

(4) Keseluruhan keterangan yang dikemukakan oleh perayu adalah penafian semata yang, dalam hal keadaan kes, dan tanpa keterangan menyokong, tidak memadai untuk menimbulkan keraguan munasabah ke atas kes pendakwaan. Perayu juga gagal mematahkan anggapan statutori di bawah s. 37(da) ADB atas imbangan kebarangkalian. Hakim bicara telah mempertimbangkan dan menilai segala keterangan di hadapannya dan betul dalam dapatan dan kesimpulan yang dibuatnya.

Case(s) referred to:
Amathevelli v. PP [2009] 3 CLJ 109 FC ***(refd)***
Amathevelli R Ramasamy v. PP [2008] 4 CLJ 413 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Charles Osenton & Co v. Johnston [1942] AC 130 ***(refd)***
Che Omar Mohd Akhir v. PP [1999] 2 CLJ 780 CA ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***
Krishna Rao Gurumurthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Lee Ah Seng v. PP [2007] 5 CLJ 1 FC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Hashim Hanafi [2003] 8 CLJ 555 HC ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 37A, 39B(1)(a)
Evidence Act 1950, s. 27

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Shoba Venugobal; DPP

[Appeal from High Court, Muar; Criminal Trial No: 45-18-2005]

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi JCA:

[1] This is an appeal by the accused person against his conviction for trafficking in dangerous drugs on 10 September 2004. He was charged with three counts under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") of trafficking ie, (a) 6517 grammes of cannabis (b) 137.88 grammes of heroin and (c) 139.38 grammes of monoacetylmorphines at house no. SBB 49 Sungai Balang Besar, Muar, in the state of Johor.

[2] Briefly, the facts of the case are as follows. Acting on information, SP5 and his party raided a house at No. 503 Jalan Parit Jalil, Tongkang Pecah, Batu Pahat and arrested the appellant who was then brought back to Balai Polis Tongkang Pecah. In the course of an interrogation, the appellant admitted to SP5 that he had kept drugs in the 'kawasan kebun' behind his father's house at No. SBB 49 Sungai Balang Besar, Muar.

[3] SP5 then administered the statutory caution under s. 37A of the DDA and thereafter reduced the said information into writing on a piece of paper tendered as exh. P17. Following SP5, the appellant has also affixed his signature twice on the said piece of paper.

[4] SP5 and his men then proceeded to the address given in the information and together with Chief Inspector Ramesh and SM Ahmad Rosli conducted a search in the house whilst SI Abdullah guarded the appellant. Nothing incriminating was found. SP5 then instructed SI Abdullah to change the appellant's handcuff from behind to the front. The appellant then led SP5 and his men to the orchard behind the house. The appellant pointed to an old cupboard. On the instruction of SP5, SM Ahmad Rosli searched the drawer and recovered two transparent plastic packets containing substances suspected to be heroin. In the two packets were a total of 14 smaller packets containing substances suspected to be heroin.

[5] In the 'kawasan kebun', the appellant pointed to four different spots which were actually mounds of fallen coconut trees. Drugs which formed the subject matter of the charge against the appellant were recovered from four different spots pointed out by the appellant.

Finding of the Trial Judge

[6] At the end of the prosecution's case, the learned trial judge held that a *prima facie* case was made out against the appellant and called upon him to enter his defence.

[7] The appellant gave his evidence on oath narrating the flow of events which was not inconsistent with the evidence led by the prosecution. Be that as it may there were some differences which the learned trial judge had noted as listed out at pp. 40 and 41 of the appeal record. The appellant denied that he had pointed out to the police party the various spots where the drugs were recovered and stated that the drugs in the cupboard and the coconut mounds were recovered by the police themselves.

[8] At the end of the defence case, the learned trial judge held that the crux of the defence case was grounded upon mere denial. The trial judge was of the view that the evidence of the appellant's wife, DW2, to be of no help to the defence, to be a fabrication, and that she had lied, and was of little evidentiary value. The appellant was accordingly found guilty, convicted of the three charges preferred against him and sentenced to death.

The Appeal

[9] In support of the appeal, learned counsel for the appellant put forth four grounds of appeal namely as follows:

(a) that the learned trial judge misdirected himself when he admitted the s. 27 information to the prejudice of the appellant

(b) that the learned trial judge seriously erred when he ruled that PW5 was credible, contrary to the evidence adduced

(c) that the learned trial judge failed to recognise that the prosecution's failure to call other key witnesses had created gaps in its own case; and

(d) that the learned trial judge failed to appreciate the defence case.

Whether S. 27 Evidence is Rightly Admitted?

[10] Learned counsel's main objection to the admissibility of the s. 27 information is premised on the ground of unfairness because of the rejection by the learned trial judge of his application for a trial within a trial to be held before the admission of exh. P17.

[11] The learned trial judge was satisfied that the prerequisites of s. 27 of the Evidence Act 1950 had been complied. The information given by the appellant was proven by oral evidence of PW5. PW5 testified that upon interrogation at Balai Polis Tongkang Pecah, the appellant admitted that he had kept drugs in the kawasan kebun behind his father's house at SBB 49, Sungai Balang Besar. This manner of giving evidence of information received under s. 27 was explained by Augustine Paul J (as he then was) in *PP v. Hashim Hanafi* [2003] 8 CLJ 555 at pp. 564-565 as follows:

> Information given under s. 27 is not a matter that is required by law to be in writing so as to be governed by ss. 91 and 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s. 60(b) of the Act. Thus a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see *Bhagirath*). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *Public Prosecutor v. Er Ah Kiat* [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in court under s. 157 of the Act (see *Saw Thein Teik v. R* [1953] MLJ 124; *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 MLJ 273. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *DPP v. Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v. R* (1990) 171 CLR 207; *DPP v. Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and

the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate.

(See: *Amathevelli v. PP* [2009] 3 CLJ 109 FC)

[12] Exhibit P17 is the piece of paper on which PW5 wrote down the information given by the appellant after administering the statutory caution under s. 37A of the DDA. That information led the police to the discovery of the drugs, the subject matter of the charge against the appellant. On the admissibility of exh. P17 this is what His Lordship had to say at pp. 30-31 of the appeal record:

On the facts and evidence, I am satisfied that all the ingredients of s. 27 of the Evidence Act, 1950, had been fulfilled namely:

(i) the information was supplied by the accused after commission of an offence or during the commission of an offence – *Choo Teck Soon Soo v. PP* [1954] MLJ 63,

(ii) the accused was under the custody of the police at the time of the information was supplied – *Soh Teh Sang & Ors v. PP* [1964] MLJ 380. Here the evidence revealed that the accused was under custody at Balai Polic Tongkang Pecah at the time he supplied the information to PW5,

(iii) the information supplied by the accused has caused the discovery of a fact ie, the offending drugs and the said information relates distinctly to the fact discovered – *Wai Chan Leong v. PP* [1989] 3 MLJ 356,

(iv) the fact or thing discovered as a result of the information must be concealed – *Yee Ye Mang v. Public Prosecutor* [1971] 1 MLJ 380. Here the evidence given by PW5 showed that the offending drugs were all concealed, which without the information supplied by the accused and the accused pointing the same, it could not have been discovered and

(v) the police has no prior knowledge of the fact or thing concealed – *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814. That was the first time PW5 and his party went to the SBB house and thereafter to the kawasan kebun.

Upon the premise enumerated above, I accepted the evidence of PW5 and admit exh. P17 in evidence without more. This evidence is relevant as it directly connected the accused to the offending drugs.

[13] We fully agree with the learned trial judge in that it is trite law that a trial within a trial is not necessary to determine the admissibility of the said information obtained under s. 27 of the Evidence Act 1950. The prosecution is under no obligation to prove voluntariness of the information given. (See: *Amathevelli R Ramasamy v. PP* [2008] 4 CLJ 413 CA). The admission of the statement is an exercise of discretion by the trial judge and based on established legal principles. (See: *Krishna Rao Gurumurthi v. PP* [2009] 2 CLJ 603 FC, *Francis Antonysamy v. PP* [2005] 2 CLJ 481 FC). In *Krishna Rao Gurumurthi v. PP (supra)* the Federal Court also quoted the case of *Charles Osenton & Co v. Johnston* [1942] AC 130 which stated that there is a presumption that the judge has rightly exercised his discretion. This has been fully appraised by the learned trial judge as evident from pp. 28 and 29 of the appeal record.

[14] We have carefully perused the said records and we come to the conclusion that the learned trial judge has rightly exercised his discretion in refusing the application for a trial within a trial in the instant case.

[15] For the aforesaid reason, we find no merit in counsel's objection on this ground.

Whether PW5 a Credible Witness?

[16] Learned counsel for the appellant submitted that PW5 is not a credible witness. According to him PW5's evidence was contradictory to his own report, and also contradicts the evidence given by other witnesses namely, PW9, PW10, PW7 and PW11. In the course of his submission, Encik Hisyam Teh Poh Teik in his usual candour and eloquence has painstakingly attempted to demonstrate to us the various so called contradictions. We are not convinced.

[17] We have also scrutinised the records carefully and find that the learned trial judge spent a good part of his judgment assessing the evidence of the not only PW5, but all other witnesses for the prosecution in concluding that a *prima facie* case had been established. The learned trial judge was constantly mindful of the contradictions of the evidence before him. From pp. 10 to 19 of the appeal record His Lordship had directed his attention to the

analysis of the evidence of the witnesses *vis-a-vis* the issue of contradictions and discrepancies in the evidence. At pp. 21-25 of the record we also note that the learned trial judge has specifically addressed the issue of contradiction between the evidence of PW5 with that of PW9, and PW11 and finally concluded that PW5 was a credible witness. We pause here to note that the learned trial judge in carrying out his function as a trier of facts and reception of evidence was merely exercising his judicial discretion of accepting or rejecting the evidence of a particular witness. In this instant, his lordship rejected certain parts of PW11's evidence and accepted the rest. Of course, the learned trial judge was entitled to do so. (*PP v. Datuk Harun Hj Idris & Ors (No 2)* [1997] 1 MLJ 15 FC, *Lee Ah Seng v. PP* [2007] 5 CLJ 1 FC, *Herchun Singh & Ors v. PP* [1969] 1 LNS 52 FC, *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC, *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197 FC, *Che Omar Mohd Akhir v. PP* [1999] 2 CLJ 780 CA).

[18] It is within the purview of the learned trial judge's function to assess the credibility of witnesses who gave evidence before him. He had the audio visual advantage of assessing them. We have not. Further, it is also trite law that the appellate courts will always be slow to interfere in matters relating to the credibility of witnesses. It serves no useful purpose for us to again and again list down the line of authorities on this issue.

[19] We are in no better position than the learned trial judge to assess the credibility of witnesses and in this case, PW5 in particular. In our considered views, this ground is devoid of any merit.

Whether There is a Gap In The Prosecution's Case?

[20] Learned counsel for the appellant submitted that the failure of the prosecution to call Chief Inspector Ramesh and Sarjan Major Ahmad Rosli created a gap in their case. Both these two named persons were part of the police party that went to the appellant's father's house at Sungai Balang Besar, Muar, Johor. They were with PW5 most of the time and as such, it was submitted that they should have been called to corroborate PW5. The appellant took the stand that the evidence of PW5 was littered with contradictions, inconsistencies and unexplained gaps.

In the words of the learned trial judge, in setting out the defence contention on PW5's testimony, "his evidence requires corroboration from these two persons to earn some semblance of credibility". Learned counsel for the defence submitted that the evidence of these two witnesses is necessary to address the following questions:

(i) whether the appellant was assaulted at the Batu Pahat house and at the police station;

(ii) whether it was the appellant who gave the information in exh. P17 at the police station;

(iii) whether the appellant alone was brought to the "kebun" behind his father's house, or whether the appellant was brought there together with the other seven persons; and

(iv) whether the appellant was threatened to sign exh. P17.

[21] It is the finding of the learned trial judge that the contradictions in the evidence of PW5 were either immaterial or minor and had accepted PW5's evidence. The evidence of PW5 was held to be credible enough and sufficient to prove the ingredients of the charges preferred against the appellant. His Lordship ruled that the case did not fall within the category of cases where the testimony of the single witness itself required that corroboration should be insisted upon as a rule of prudence. (See: *Balachandran v. PP* [2005] 1 CLJ 85 FC). It is trite that the testimony of a single witness, if believed, is sufficient to establish any fact. (See: *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340). Witnesses are weighed, not counted (*testes ponderantur non numerantor*).

[22] The right to call or not to call a particular witness lies solely with the prosecution. But where the prosecution's evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him available to the defence will be of no avail. The present appeal is not such a case. In our view, the non calling of these two witnesses does not create a gap in the prosecution's case. Their evidence is not material for the unfolding of the narratives of the prosecution's case. The prosecution was content with the evidence of PW5 to prove their case against the appellant, without calling Chief

Inspector Ramesh and Sarjan Mejar Ahmad Rosli to testify. That is their prerogative. The learned trial judge found (in our view rightly) that PW5's evidence together with the evidence of other witnesses called by the prosecution was sufficient to make out a *prima facie* case against the appellant.

[23] Again, we are not persuaded by the argument put forth by learned counsel and therefore this ground must also fail.

Whether the Trial Judge had Failed to Appreciate the Defence Case?

[24] It was submitted before us that the learned trial judge has erred in holding that the defence of the appellant was a mere denial. This, according to learned counsel arises out of the failure of the learned trial judge to appreciate the defence evidence.

[25] We disagree. In his judgment (at p. 44 of the Appeal Record) the learned trial judge has set out the denials made by the appellant as follows:

> Having considered the totality of the evidence, I opined that the crux of the defence case is grounded upon mere denial;
>
> (i) the accused denied giving the said information to the police while under custody at Balai Tongkang Pecah;
>
> (ii) denied PW5 administering the caution under s. 37 of the DDA, 1952;
>
> (iii) denied giving the information that he kept drugs at the kawasan kebun of his father's house;
>
> (iv) denied affixing his signatures on exhibit P17;
>
> (v) denied leading/taking PW5 and PW5 and his team to the kawasan kebun where the offending drugs were discovered, and
>
> (vi) denied pointing the locations of the drugs discovered.
>
> It is trite that such denial without other proof to reasonably dislodge the prosecution evidence is not sufficient to cast a doubt on the prosecution case. I am satisfied that on the evidence there were no other proof adduced by the accused to sustain his denial.

[26] What the learned trial judge stated in the above mentioned passage is his summary and evaluation of the evidence given by the appellant on oath. The appellant also called DW2, his wife. The learned trial judge's appraisal of DW2's evidence as stated at pp. 45-46 of the Appeal Record states:

> DW2's (the accused's wife) evidence is of no help either. She claimed to have been arrested by the police together with the accused and brought along to Balai Tongkang Pecah. Her two children were also taken to Balai Polis Tongkang Pecah. She sat outside the Balai and heard the accused being beaten and the accused screaming in pain. She added that she was also taken to the SBB house. However when the seven other arrested persons were taken to IPD Muar, she was left behind. Freed.
>
> DW2 was plainly lying;
>
> (i) there was no police report of her arrest whatsoever;
>
> (ii) if she was under arrest why was she sitting outside the Balai at Balai Polis Tongkang Pecah;
>
> (iii) none of the civilian witnesses, PW8, PW9, PW10 and PW11, testified nor adverted to her presence that she was with them gathered together at the kitchen portion of the SBB house;
>
> (iv) if she was under arrest why was she left behind at the SBB house when the seven other persons arrested at the SBB house were all taken to IPD Muar and placed under remand for ten days thereafter; and
>
> (v) she did not lodge any police report of the alleged beatings suffered by her husband.
>
> Her evidence is indeed a fabrication. It is of little evidentiary value bearing in mind that her arrest was the crux of her testimony where her further evidence flows on. It has no bearing on the evidence produced by the prosecution nor add value to the accused's defence.

[27] It has been affirmed by the Federal Court in *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150 FC that the degree or extent to which the evidence need to be examined would depend on the particular facts and circumstances of each case and the issues involved. What we have reproduced from the learned trial judge's judgment in the preceding paragraphs is testimony to the fact that the defence evidence has been considered and fully appraised by his lordship.

[28] As to the learned trial judge's assessment of the defence evidence, we are unable to agree with the learned appellant counsel's submission. We agree with the learned trial judge that the totality of the evidence put forth by the appellant was but a plain denial which, in the circumstances of the case, and without any supporting evidence would be insufficient to cast a reasonable doubt on the prosecution's case. The appellant has also failed to rebut on the balance of probabilities, the statutory presumption under s. 37(da) of the DDA.

[29] We are satisfied that in coming to the finding that the defence has failed to cast a reasonable doubt on the prosecution's case, the learned trial judge had considered and evaluated all of the evidence before him and was right in arriving at the findings and conclusion which he did. The records speak for themselves. For these reasons, we fail to see any merit in counsel's objection on this ground.

[30] It is our unanimous decision that the appeal be hereby dismissed. Both the conviction and sentence by the High Court judge is affirmed.